JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 446

CREIGHTON STATIONERY COMPANY and GUARANTEE INSURANCE COMPANY,
Petitioners,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and SADIE IMA SUTTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California.

FRANK J. FILIPPI, of
MULLEN & FILIPPI,
315 Montgomery Street, San Francisco 4, California,
Attorneys for Petitioners.

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No.

CREIGHTON STATIONERY COMPANY and GUARANTEE INSURANCE COMPANY,
Petitioners,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and SADIE IMA SUTTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California.

Creighton Stationery Company and Guarantee Insurance Company, the petitioners herein, pray that a writ of certiorari be issued to review the final decision of the Supreme Court of the State of California, reversing the decree of the First District Court of Appeal of the State of California.

OPINION BELOW.

The opinion of the Supreme Court of the State of California appears in 46 A.C. 762, 298 Adv. P. 2d 857, and is attached here as Appendix B, while the opinion of the First District Court of Appeal appears in 138 A.C.A. 602, 292 P. 2d 952, and is attached here as Appendix C.

JURISDICTION.

1. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> (3) By Writ of Certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * *."

2. The following cases, holding that the United States Supreme Court may review a decision of a State Supreme Court construing a state statute by which construction it is contended a party to the proceeding is denied a right guaranteed by the Federal Constitution, sustain the jurisdiction of this Court:

Cudahy Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 366, 68 L.Ed. 366;

Dahn Ke-Walker v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239;

Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 42 S.Ct. 101, 66 L.Ed. 227;
St. Louis etc. Railway Co. v. Wynne, 224 U.S. 354, 32 S.Ct. 493, 56 L.Ed. 799.

3. The Supreme Court of the State of California is the highest Court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of the State of California.

5. The judgment herein sought to be reviewed was filed on June 28, 1956, while that Court by its Order dated July 24, 1956 denied your petitioner's petition for a rehearing in that Court. (See Appendix A.)

6. The Federal question of substance which has been decided by the State Court is that the guarantee of equal protection of the law as contained in Amendment XIV, Section 1 to the Federal Constitution does not require that litigants to the same action, similarly situated, should be granted equal remedial rights when no rational grounds exist for distinguishing between them. That decision of the Supreme Court of the State of California is squarely in conflict with the decisions of this Court construing the Fourteenth Amendment to the Federal Constitution. (*Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler,* 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed 115; *Atchison, T. & S. F. Ry. Co. v. Vosburg,* 238 U.S. 56, 35 S.Ct. 675, 59 L.Ed. 1199; *Wadley Southern Ry. Co. v. Georgia,* 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405; *Backus v. Fort Street Union Depot Co.,* 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed.

853; *Railway Co. v. Ellis,* 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666.)

THE QUESTION PRESENTED.

Has due process of law and the equal protection of the law been denied to the Petitioners by the construction placed upon a statute by a State Court of last resort, which denies to Petitioners a right conferred upon the opposing party in a Workmen's Compensation proceeding before the Industrial Accident Commission of the State of California?

CONSTITUTIONAL PROVISIONS INVOLVED.

This case presents the question of Petitioner's rights under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution (Amendment XIV, Section 1):

> "Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Sadie I. Sutton filed a claim for benefits under the Workmen's Compensation Law of the State of California because of an injury allegedly having arisen out of and having occurred in the course of her employment on April 2, 1948. As a result of several hearings in this matter, the Industrial Accident Commission of the State of California determined that Sadie I. Sutton was entitled to a permanent disability rating of 100 per cent.

On April 1, 1953, and before the expiration of the five year jurisdictional period provided for by Statute, your Petitioner filed a Petition to reduce the Permanent Disability Rating which previously had been awarded by the Industrial Accident Commission. Thereafter, following the expiration of the five year jurisdictional period, hearings were held, additional medical evidence was presented, and the Permanent Disability Rating was reduced from 100 per cent to 41½ per cent. (See Appendix D.)

The Industrial Accident Commission of the State of California determined this action to have been entirely proper under interpretations previously given to California Labor Code Sections 5410, 5803 and 5804, which read:

> "Labor Code, Sec. 5410: Nothing in this chapter shall bar the right of an injured employee to institute proceedings for the collection of compensation within five years after the date of injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the Commission in such cases shall be

a continuing jurisdiction at all times within such period. This section does not extend the limitation provided in Section 5407."

"Labor Code, Sec. 5803: The Commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the Commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor."

"Labor Code, Sec. 5804: No Award of compensation shall be rescinded, altered, or amended after five years from the date of injury. Provided, however, that after an award has been made finding that there was employment and the time to Petition for a Rehearing or Reconsideration or Review has expired or such Petition has been determined, the Commission upon a Petition to Reopen shall not have the power to find that there was no employment."

In *Gobel v. I.A.C.*, 1 C. 2d 100, 33 P. 2d 413; *Corwell L. & C. Co. v. I.A.C.*, 211 Cal. 154, 294 Pac. 703; *Westvaco etc. Corp. v. I.A.C.*, 136 A.C.A. 78, 288 P. 2d 300, and *Furness Pacific Ltd. v. I.A.C.*, 74 C.A. 2d 324, 168 P. 2d 761, it had been held that an application for new and further disability, if filed within the five year period, would be timely and that the Industrial Accident Commission could determine the question after the expiration of the five year period.

It was contended by your Petitioner throughout these proceedings that any other interpretation of the

statutes involved would have denied to it equal protection of the law; and that new and further disability had been interpreted to mean a recurrence of disability or a change in physical condition, either an improvement or retrogression.

After filing a timely Petition for Reconsideration, as provided by law, the applicant, Sadie I. Sutton, petitioned to the First District Court of Appeal of the State of California. That Court, in its decision rendered January 18, 1956 (138 A.C.A. 602, 292 P. 2d 952), affirmed the Commission's action (see Appendix C).

The applicant then filed a Petition for Hearing before the Supreme Court of the State of California within the time limit for doing so. By its decision dated June 28, 1956, (46 A.C. 762, 292 Adv. P. 2d 851), the Supreme Court of the State of California held that the provisions of California Labor Code Section 5410, while it authorized action after the five year jurisdictional period upon petitions filed within the five year period by an employee, prevented the Industrial Accident Commission from taking such action upon petitions filed within the five year period by an employer or its insurance carrier (see Appendix B).

A rehearing in the State Supreme Court was sought by petitioners. This was denied on July 24, 1956 (see Appendix A).

REASONS FOR GRANTING THE WRIT.

The Supreme Court of the State of California has decided an important question arising out of the Fourteenth Amendment of the Constitution of the United States, involving the equality of litigants' rights under the equal protection of the laws clause thereto in a way untenable and in conflict with the applicable decisions of this Court in the following cases:

Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler, 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed. 115;

Atchison, T. & S. F. Ry. Co. v. Vosburg, 238 U.S. 56, 35 S.Ct. 675, 59 L.Ed. 1199;

Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405;

Backus v. Fort Street Union Depot Co., 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed. 853;

Railway Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666.

The Supreme Court of California has held that although the Industrial Accident Commission of California may act to alter, amend, or rescind an award after the five year jurisdictional period provided for in California Labor Code Sections 5803 and 5804 upon an employee's petition filed within five years, it cannot do so upon an employer's or insurance carrier's petition filed within that time.

The Supreme Court of the State of California has denied that this is a denial of equal protection of the laws on the ground that:

"There are manifest differences between an injured employee and his employer and the latter's

> insurance carrier upon which the legislature could base a reasonable classification."

Yet, the holding runs counter to this Court's pronouncement in *Backus v. Fort Street Union Depot Co., supra,* in which the Court said:

> "An act of the legislature which in terms gave to one individual certain rights, and denied to another similarly situated the same rights, might be challenged on the ground of unjust discrimination and a denial of equal protection of the laws."

This Court early recognized that a reasonable and valid ground existed for granting to injured workmen certain rights under Workmen's Compensation Laws that were not given to general litigants: *New York Central Ry. Co. v. White,* 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667. Yet there, the classification of employee litigants was a reasonable one, which is the very basis of the constitutionality of workmen's compensation laws. For, as the Court then observed:

> "Under the . . . (former) system the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain . . ."

The distinction made here between the litigants to the same proceeding is not one based upon reasonable classification. If the applicant could have petitioned within five years for an increase in her permanent disability rating from 41½% to 100% and the Commission after the jurisdictional period could raise that rating, there is not such a distinction existing between the parties to deny the employer or its insurance car-

rier the right to have a permanent disability rating reduced from 100% to 41½% after the five year jurisdictional period upon a petition timely filed within that period. Certainly, if the evidence warranted either an increase or a reduction of a permanent disability rating during the five year period, it could be given. The mere passage of five years does not in itself provide a valid basis for denying to an employer or his insurance carrier a right granted to an employee. As said by this Court in *Railway Co. v. Ellis, supra*:

> "It is apparent that the mere fact of classification is not sufficient to relieve the Statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it has been made upon some reasonable ground."

The denial of equal rights to one litigant to a proceeding given to the other party here by the Supreme Court of California is based upon the word "employee" found in California Labor Code Section 5410:

> "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of injury upon the grounds that the original injury has caused new and further disability. The jurisdiction of the Commission in such cases shall be a continuing jurisdiction at all times within such period. . . ."

Clearly, if this Statute when construed with California Labor Code Sections 5803 and 5804, debars the employer from a right given the employee then it is

unconstitutional as a denial of the equal protection of the laws.

This Court in *Wadley Southern Railway Co. v. Georgia, supra,* said:

> "An act which opened the doors of the Court, but placed upon the litigant a penalty for failure to make good his defense, which was so great as to deter him from asserting that which he believed to be his right, was tantamount to a denial of the equal protection of the law."

It would appear obvious that the present interpretation by the California Supreme Court of Labor Code Section 5410 results in the unconstitutionality of that section. It is therefore reasonable that your Honorable Court attempt to find an interpretation of this statutory provision that would result in sustaining its constitutionality and yet in ameliorating its unconstitutional effect. This can be done only by considering the phase, "of any injured employee" to be of no effect. Implicit, of course, in this statutory construction is the underlying rationale that the legislature would not grant to one party a right not granted to another in similar circumstances.

Elimination of words and phrases from statutes so that they may conform with what is conceived to be the true legislative intendment is a recognized method of statutory construction, and in this respect, your Honorable Court's attention is directed to *United States v. York,* 131 Fed. 323; *Sherry v. Leonard,* 189 Ark. 869, 75 S.W. 2d 401 (Arkansas); *People v. Heron,* 34 C.A. 2d 755, 90 P. 2d 154 (California); *Carlson v. Mullen,* 29 Idaho 795, 162 Pac. 332

(Idaho); *State v. Horn,* 126 Kan. 591, 270 Pac. 597 (Kansas); *Grieb v. National Bond and Investment Co.,* 264 Ky. 289, 94 S.W. 2d 612 (Kentucky); *State v. Caldwell,* 170 La. 751, 129 So. 368 (Louisiana); *Pressman v. State Tax Commission,* 204 Md. 78, 102 A. 2d 21 (Maryland); *Cormick v. West Duluth,* 47 Minn. 272, 50 N.W. 128 (Minnesota); *Bobo v. Commissioners,* 92 Miss. 792, 46 So. 819 (Mississippi); *State v. Consolidated School District,* 302 Mo. 558, 258 S.W. 1011 (Missouri); *State v. Holmes,* 114 Mont. 372, 136 P. 2d 220 (Montana); *Paxton Etc. Co. v. Farmers Etc. Co.,* 45 Neb. 884, 64 N.W. 343 (Nebraska); *Westinghouse Electric Co. v. United Electrical Workers,* 139 N.J. Eq. 97, 49 A. 2d 892 (New Jersey); *Monongahela v. Grimes,* 32 Pa. Co. Ct. 612 (Pennsylvania); *McLinden v. City of Columbia,* 101 S.C. 48, 85 S.E. 234 (South Carolina); *Board of Education v. Commission,* ..... Utah ....., 247 P. 2d 435 (Utah); *Lauderman v. Pembine-Mescauno Pond Assn.,* 251 Wis. 122, 28 N.W. 2d 453 (Wisconsin); *Burnette v. Commonwealth,* 194 Va. 785, 75 S.E. 2d 482 (Virginia). In each of these cases, the Courts either struck down or ignored words or phases in the statutes under consideration in order to sustain their constitutionality and to effect the intent of the legislature. So, here, by considering the phrase, "of any injured employee" to be of no effect, it will be possible to guarantee equal protection of the law to both party litigants and, at the same time, to carry into effect the obvious intent of the legislature.

The interpretation sought here is necessary because of the rule, frequently recognized by this Court, that

it "will not decide an issue of constitutionality if the case may justly and reasonably be decided under a construction of the statute under which the act is clearly constitutional:" *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510; *Blodgett v. Holden*, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206; *Federal Trade Comm. v. American Tobacco Company*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696; *Texas v. Eastern Texas R. Co.*, 258 U.S. 204, 42 S.Ct. 281, 66 L.Ed. 566.

CONCLUSION.

Your Petitioner respectfully submits that the Writ of Certiorari should issue to the end that this Court may review the decision of the Supreme Court of California and determine whether that Court has deprived Petitioners of rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, reconstruing the provisions of California Labor Code Section 5410 so as to protect those rights of your Petitioner.

Dated, San Francisco, California,
September 21, 1956.

Respectfully submitted,
FRANK J. FILIPPI, of
MULLEN & FILIPPI,
Attorneys for Petitioners.

(Appendices A, B, C and D Follow.)

Appendix A

CLERK'S OFFICE, SUPREME COURT
State Building
San Francisco, California,
July 24, 1956.

Dear Sir: I have this day filed Order Rehearing Denied in re S. F. No. 19,492, Sutton vs. I. A. C.

Respectfully,
William I. Sullivan, Clerk.

Appendix B

(Copy)

Filed, June 28, 1956,
William I. Sullivan, Clerk.

The Supreme Court of the State of California

In Bank

S. F. No. 19,492

Sadie I. Sutton,
Petitioner,

vs.

Industrial Accident Commission of the State of California, Creighton Stationery Company, and Guarantee Insurance Company,
Respondents.

On April 2, 1948, petitioner was injured in the course of her employment, and on March 14, 1952, the Industrial Accident Commission awarded her a permanent disability rating of 100 per cent. On April 1, 1953, the next to the last day of the five-year period after the injury, her employer's insurance carrier filed a petition with the commission to have the award amended to reduce the percentage of permanent disability. After proceedings were had the commission

set aside its award and ordered that petitioner's permanent disability be reduced to 41½ per cent.

Petitioner seeks to have the last mentioned order annulled on the grounds that: (1) The commission was without jurisdiction to make the order after the five-year period under the workmen's compensation laws (Lab. Code, sec. 5804); (2) the 1949 amendment (Stats. 1949, ch. 677, sec. 2) to section 5804 which increased the period of time from 245 weeks to five years should not be retroactively applied to the instant proceedings; (3) the findings of the commission do not support the order sought to be annulled. In view of the result reached herein that the commission should not have made the order after the expiration of the five-year period and that the order must be annulled on the first of the grounds heretofore set forth, it is unnecessary to discuss the other contentions.

Section 5803 of the Labor Code provides generally that the commission has continuing jurisdiction over its awards and at any time upon notice and opportunity to be heard it may rescind, alter or amend such award, good cause appearing therefor. This power includes the right to diminish, increase or terminate, within the limits mentioned in the workmen's compensation laws, any compensation awarded on the ground that the disability of the person in whose favor the award was made has recurred, increased, diminished or terminated. That section is qualified, however, by section 5804 which reads: "No award of compensation shall be rescinded, altered, or amended

after five years from the date of the injury. Provided, however, that after an award has been made finding that there was employment and the time to petition for a rehearing or reconsideration or review has expired or such petition if made has been determined, the commission upon a petition to reopen shall not have the power to find that there was no employment." (See Subsequent Etc. Fund v. Ind. Acc. Com., 39 Cal. 2d 83.) There is another provision which should be considered in connection with section 5804. Section 5410 of the Labor Code provides: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period. This section does not extend the limitation provided in Section 5407." The "chapter" referred to is that dealing with "Limitations of Proceedings" commencing with section 5400.

The commission claims that inasmuch as the carrier's application to amend the award was filed with it within the five-year period, the commission could make the amendment after the five years had expired. It has been held in considering *section 5410, supra*, that an application by an employee for new and further disability, if filed within the five-year period, is timely and the commission may determine the question after the expiration of the period. (Gobel

v. Industrial Acc. Com., 1 Cal. 2d 100; Furness Pacific Ltd. v. Ind. Acc. Com., 74 Cal. App. 2d 324; Cowell L. & C. Co. v. Industrial Acc. Com., 211 Cal. 154; Westvaco etc. Corp. v. Ind. Acc. Com., 136 A.C.A. 78; Pacific Indem. Co. v. Ind. Acc. Com., 85 Cal. App. 2d 490; see, Douglas Aircraft Co. v. Ind. Acc. Com., 31 Cal. 2d 853.)

This holding is in accord with the express wording of section 5410, *supra*. That section provides that an "injured employee" may "institute," that is, commence proceedings for compensation within five years after the date of the injury on the ground that the original injury has caused new and further disability. There is no restriction on the time within which the commission may act, hence it may act on the proceedings commenced within the five years after the five years have elapsed. Section 5410 is in that portion of the workmen's compensation laws dealing with "Limitations of Proceedings." (Lab. Code, Div. 4, Pt. 4, ch. 2.)

On the other hand, sections 5803 and 5804, *supra*, which are applicable in the instant case, are in the part of the code dealing with "Finding and Awards"* and there is nothing in section 5804 about the time within which proceedings to amend or rescind an award may be commenced. The restriction is a flat declaration that no award "shall" be rescinded or amended after five years from the date

*It (§ 5804) has been said to be a jurisdictional limitation. (Douglas Aircraft Co. v. Ind. Acc. Com., *supra*, 31 Cal.2d 853, 855.)

of injury. The different language in the two sections (5410 and 5804) indicates that a different rule was intended. When the Legislature intended that a proceeding was timely when commenced within the period, even though decided later, it so stated. (Lab. Code, sec. 5410, *supra).* Its failure to so provide in section 5804 indicates that it did not intend the same result.* It is true that the foregoing interpretation of section 5804 means that five years' time is not given in which to apply for relief under section 5803, because obviously an application on a date such as the next to last day could not be decided until after the time limited, but section 5804 does not purport to allow five years in which application may be made for relief (as does section 5410). On the contrary, it provides that the commission may not amend or rescind its award after that time.

The distinction between the two sections was recognized in Westvaco etc. Corp. v. Ind. Acc. Com., *supra,* 136 A.C.A. 78, 81, where the court, after stating that the question was whether the proceeding was under section 5410 or 5803 and 5804, said: "The petition of April 9, 1953, was barred by the provisions of section 5410 expressly limiting the time within which a petition for new and further disability may be filed to five years after the injury. If the commission were at-

*Compare section 473 of the Code of Civil Procedure which provides that an application for relief from default must be made in six months and section 660 which provides that the court has no power to pass on a motion for a new trial after 60 days after notice of entry of judgment, etc.

tempting to exercise under section 5803 a continuing jurisdiction to amend or alter an order, the order amending would be void because of the limitation of such power expressed in section 5804. . . . The commission, within the five-year period, is authorized by section 5803 'to review, grant or regrant, diminish, increase or terminate' and therefore could make a new order increasing or decreasing the percentage of permanent disability and the award therefor, and of course, if the commission, proceeding under section 5410, should find that there was new and further disability, it could then make an award therefor. This latter award could be made after the expiration of the five-year period, as the petition for it had been filed within that period.

"It is well settled that the commission has power to continue its jurisdiction to determine new and further disability beyond the five-year period, where application is made within that period. . . .

"If the true and exclusive meaning of section 5410 is that there can be no new and further disability application where there was a permanent disability award, then the employee here must be denied any increase in permanent disability over the percentage found in the first order, because the commission failed to amend that order within the five-year period and his present condition does not constitute 'new and further disability' within the meaning of that section. . . . During the five-year period the commission could under section 5803 amend or alter its previous order, or could act under section 5410. *After the five-year*

period, only section 5410 can be used, and then, only if a prior proceeding is filed under it." (Emphasis added.) (See, also, Broadway-Locust Co. v. Ind. Acc. Com., 92 Cal. App. 2d 287; Furness Pacific Ltd. v. Ind. Acc. Com., *supra,* 74 Cal. App. 2d 324.) Douglas Aircraft Co. v. Ind. Acc. Com., *supra,* 31 Cal. 2d 853, while not entirely clear, merely follows Gobel v. Industrial Acc. Com., *supra,* 1 Cal. 2d 100 (decided under the earlier version of section 5410) which held that the commission could pass on an application for new and further disability after the specified period if the application was filed within it. Larsen v. Industrial Acc. Com., 125 Cal. App. 13, is distinguishable but the language therein contrary to the foregoing interpretation is hereby disapproved.

In the instant case the proceeding could not have been taken under section 5410 because the employer's carrier filed the application. It was necessarily under sections 5803 and 5804. Section 5410 refers only to a proceeding by the "injured employee." By no device may that phrase be held to include an employer or his carrier.

The employer's insurance carrier claims that the foregoing interpretation of the sections discussed is contrary to that heretofore given to them by the commission. That is at least doubtful, but in any event, a former administrative construction contrary to the statutes cannot control. (Groves v. City of Los Angeles, 40 Cal. 2d 751.)

The carrier urges that the foregoing construction is a denial of due process and equal protection of the

law* because a different period of time is given to employees (sec. 5410, *infra)* than to employers or their carriers (sec. 5804, *supra*) in which an award may be altered. There are manifest differences between an injured employee and his employer and the latter's insurance carrier upon which the Legislature could base a reasonable classification. The whole theory of workmen's compensation laws recognizes such a distinction. The distinction has been made in statutes regulating attorney's fees which have been upheld. (See, Marczeski v. Pittsburgh Steel Ore. Co., (Minn.) 191 N.W. 743; Marshall v. Foote, 81 Cal. App. 98; Ahmed's Case, (Mass.) 179 N.E. 684; Norman's Case, (Mass.) 180 N.E. 238.)

The award is annulled.

Carter, J.

We Concur:

Gibson, C. J.; Shenk, J.; Schauer, J.; Spence, J.; McComb, J.

*(U.S. Const., Fourteenth Amendment, § 1; see, Cal. Const., art. VI, § 25, art. I, §§ 11, 21.)

Appendix C

In the District Court of Appeal of the
State of California,
First Appellate District, Division One

1 Civil No. 16,871 Filed, January 18, 1956

Sadie I. Sutton,
Petitioner,
vs.
Industrial Accident Commission of the State of California, Creighton Stationery Company, and Guarantee Insurance Company,
Respondents.

Opinion

Petitioner seeks review of the record and award of the commission terminating an "Order Denying Applicant's Petition for Reconsideration and Order Amending Decision after Reconsideration."

Questions Presented.

1. Where a proceeding to rescind and amend an award is brought within five years from the date of the injury, does section 5804, Labor Code, prohibit the commission from acting on such petition after the five year period has elapsed?

2. Is the 1949 amendment to section 5804 retroactive?

3. Do the findings support the award?

RECORD.

April 2, 1948, employee was injured.

March 14, 1952, the commission awarded her a permanent disability rating of 100 per cent.

April 1, 1953 (next to the last day of five years following the date of the injury), the carrier petitioned to reduce this rating. Various proceedings were had thereafter culminating in the order, review of which is sought. This order set aside the findings and award of March 14, 1952, which awarded the employee a permanent disability rating of 100 per cent, and granted the carrier's petition to reduce the rating by reducing it to 41½ per cent.

1. POWER OF COMMISSION.

Section 5803, Labor Code, provides that the commission has continuing jurisdiction over all its awards and at any time may rescind, alter, or amend them. Section 5804 provides: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury."

Although there is language favorable to the action of the commission here in one case (Larsen v. Industrial Acc. Com., 125 Cal. App. 13) and favorable to the contention of the petitioner in two cases (Broadway-Locust Co. v. Industrial Acc. Com., 92 Cal. App. 2d 287; Westvaco etc. Corp. v. Industrial

Acc. Com., 136 A.C.A. 78, hearing denied by Supreme Court), the exact question before us has never been passed upon in this state. In the Larsen case, on the last day of the 245th week after the date of the injury,* the commission, without notice to anyone, of its own motion changed the award previously made. Claiming that the last award was void, the carrier after the 245 weeks had expired, petitioned for a rehearing. This was granted and the commission upon such rehearing, affirmed the last award. The carrier then proceeded in the appellate court to review that award. The court held that the action of the commission on the last day of the statutory period was void because of lack of notice to the parties and that its action affirming that award was likewise void because it was based upon a petition filed after the statutory period. In so doing, however, it used the following language from which the commission derives comfort (p. 17): "If on the last day of the week of the two hundred forty-five week period an application for an amended award had been made, on notice duly given, and had thereupon been heard and submitted, and if the commission ruled thereon some day subsequent to the two hundred forty-five week period the question would be altogether different. (Osmont v. All Persons, 165 Cal. 587 (133 Pac. 480).)" The Osmont case dealt with a motion to set aside a default judgment in the superior court filed two days before the

*At that time the limitation in section 5804 was 245 weeks after the date of the injury. In 1949 the section was amended by substituting "five years" for "245 weeks." (Stats. 1949, ch. 677, §2, p. 1174.)

statutory period allowed by section 473, Code of Civil Procedure, for applications for relief from default, but not passed upon by the court until after that period. The motion was denied by the trial court because it believed that by the expiration of the statutory period it had lost jurisdiction to act. The appellate court held that the motion having been timely made the court retained jurisdiction to act upon it.

The Broadway-Locust case, supra, relied upon by petitioner, dealt with the action of the Industrial Accident Commission in acting upon a petition for permanent disability rating filed more than 245 weeks after the date of the injury. In denying the power of the commission to so act, the court held that the petition was not one to exercise the powers granted by section 5803, to which the limitation set forth in section 5804 applies, but was one for "new and further disability," the power to pass upon which is provided in section 5410. It then held that that section required that the application for new and further disability must be filed within the 245 weeks therein mentioned. In discussing section 5804 as contrasted with section 5410 the court used language implying that by reason of section 5804 the commission's power to act upon a petition brought under section 5803 expired 245 weeks after date of the injury. Such language, however, was not necessary to the decision nor did the court have before it facts upon which to base such a decision. The same is true of the decision in Westvaco etc. Corp. v. Industrial Acc. Com., supra, 136

A.C.A. 78.* There in determining that the commission had the power to decide after five years from the date of the injury (the limitation set forth in section 5410) a petition for new and further disability filed within that period, we also discussed section 5804 and basing our discussion upon the language above mentioned in the Broadway-Locust case, supra, we stated, in effect, that the commission would have no jurisdiction to act upon any proceeding brought under section 5803 after the expiration of five years. The only matter before us, however, was a petition under section 5410 and hence our discussion of section 5803 was not necessary to the decision. Therefore, we feel that neither the Broadway-Locust nor the Westvaco case is precedent on the question before us.

Douglas Aircraft Co. v. Industrial Acc. Com., 31 Cal. 2d 854, comes nearer to the facts of this case than any case we have found. There, within the statutory period, the employee who for about four years had received medical treatment from his employer without any application to the commission, petitioned for a permanent disability rating. The commission after the statutory period gave him an award for total temporary disability. Thereafter the employee petitioned for a further hearing. A hearing was granted and the commission issued a "Supple-

*There are other cases holding that section 5410 does not limit the commission to acting within the statutory period of the date of the injury where the application for new and further disability is filed within that period. See Gobel v. Ind. Acc. Com., 1 Cal. 2d 100; Furness Pacific Ltd. v. Ind. Acc. Com., 74 Cal. App. 2d 324; Pacific Indem. Co. v. Ind. Acc. Com., 85 Cal. App. 2d 490.

mental Award," granting him a permanent disability rating. In upholding the award, the Supreme Court said concerning the limitation in section 5804 which at that time was 245 weeks (p. 855): "This provision, by its terms, creates a jurisdictional limitation upon the commission to make an award altering, amending or rescinding its final orders with respect to a claim on which it has already acted. (Hanna, Industrial Accident Commission Practice and Procedure, 1943, p. 118.) However, under the rule announced in the Gobel case, the commission may make a determination after that time has expired, providing the application requesting such action is filed during the 245-week period." The court went on to hold that as the commission had failed to pass on the employee's petition for permanent disability that question remained open and undetermined and that its determination after the statutory period was jurisdictionally justified by the decision in the Gobel case, supra. While the Gobel case dealt with a petition for a new and further disability and the Douglas case dealt with the failure of the commission to act on an original petition for permanent disability and our case deals with a petition to change or amend a permanent disability award already given, we see no reason why the above quoted language from the Douglas case should not apply here. It should be pointed out that to hold that the commission may not act on a petition under section 5803, filed, but not acted upon, within the five year period, would actually give a petitioner less than five years in which to apply for a change

of rating, as he would have to apply a sufficiently long period before the expiration of five years to give notice of the hearing and to give the commission time in which to act. This period, depending as it would on the time the commission might take to act, would be a very indefinite period, indeed. Moreover, it would put the commission in a position where, by merely postponing action on a petition it could deny a petitioner relief without considering his petition.

2. Does the 1949 Amendment Apply?

Petitioner contends that it does not and that therefore the limitation period is 245 weeks. The petition upon which the final action of the commission is based was filed more than 245 weeks after the date of the injury, which occurred prior to the amendment. Petitioner cites Aetna Casualty & Surety Co. v. Industrial Acc. Com., 30 Cal. 2d 388. That case was not dealing with a statute of limitations. It dealt with an amendment to section 4661, Labor Code, changing the basis for disability payments which the employee would receive. That the Legislature may extend the time limitation in the Workmen's Compensation Act so as to affect proceedings then pending has already been determined. In Davis & McMillan v. Industrial Acc. Com., 198 Cal. 633, in applying an amendment extending the time of an employee to claim the benefits of the act who had been injured before the amendment, the court said (pp. 636-637): "It is clear from the decisions of the court of this state as well as those of other jurisdictions that a person has no vested

right in the running of a statute of limitations unless it has completely run and barred the action. . . . It is equally well settled that an amendment to a statute of limitations enlarging the period of time within which an action can be brought as to pending causes of action is not retroactive legislation and does not impair any vested right." (See also Mudd v. McColgan, 30 Cal. 2d 463.)

3. Findings Support the Award.

Petitioner claims that the award of the commission does not contain findings of fact nor is it accompanied by any summary of evidence. The findings found "Applicant's injury caused permanent disability of 41½% for the factors of disability set forth in the permanent disability rating served and filed February 4, 1955." This rating set forth in detail the physical condition of petitioner resulting from the industrial injury. The referee's written comments are also included in the record. The order of the commission meets the requirements as to findings as set forth in sections 5800 and 5953, Labor Code. "Finding the ultimate facts is sufficient. Findings on special probative facts are not required." (Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com., 29 Cal. 2d 492.)

Petitioner contends that the commission failed to state any reasons for failing to apply the "odd lot" doctrine. In the "Report of Panel One on Applicant's Petition for Reconsideration" the commission expressly stated that that doctrine was not applicable, citing Meyers v. Industrial Acc. Com., 39 Cal. App.

2d 665, and California Comp. Ins. Co. v. Industrial Acc. Com., 128 Cal. App. 2d 797. Petitioner has cited no authorities to the contrary of the commission's position in this respect. As said in Pacific States S. & L. Co. v. O'Neill, 7 Cal. 2d 586, 588, assignments of error "unaccompanied either by argument or citation of authority . . . under a well established rule of appellate practice, we are not constrained to take further notice thereof."

The order and award are affirmed.

Bray, J.

We concur:

Peters, P. J.

Fred B. Wood, J.

Appendix D

Mailed From San Francisco Office
Jul 28, 1955
Industrial Accident Commission
State of California

Before the Industrial Accident Commission of the State of California

Claim No. 117-098

Sadie Ima Sutton,
Applicant,
vs.
Creighton Stationery Company, and Guarantee Insurance Company,
Defendants.

ORDER DENYING APPLICANT'S PETITION FOR RECONSIDERATION AND ORDER AMENDING DECISION AFTER RECONSIDERATION

Good Cause Appearing Therefor:

It Is Hereby Ordered that applicant's Petition for Reconsideration, entitled 'Petition For Rehearing', filed herein on June 28, 1955 be, and the same hereby is, denied.

* * * * * * *

It Appearing that the Decision After Reconsideration served and filed herein on June 9, 1955 is correct in substance but not in form and details, and

Good Cause Appearing Therefor:

It Is Hereby Ordered that the Decision After Reconsideration served and filed herein on June 9, 1955 be, and the same hereby is, annulled, vacated and set aside.

It Is Hereby Further Ordered that the following decision of this Commission be substituted in lieu thereof:

ORDERS

It Is Hereby Ordered that defendants' Petition to Reopen entitled 'Petition to Reduce Permanent Disability Rating', filed herein on April 1, 1953 be, and the same hereby is, granted.

It Is Hereby Further Ordered that the Supplemental Findings And Award For Permanent Disability Rating served and filed herein on March 14, 1952 be, and the same hereby is, annulled, vacated and set aside.

It Is Hereby Further Ordered that the Findings, Conclusion And Orders Granting Petition to Reopen served and filed herein on March 31, 1954 be, and the same hereby is, annulled, vacated and set aside.

It Is Hereby Further Ordered that the following Findings, Award and Order be, and the same hereby are, made the final decision of this Commission after reopening and reconsideration.

FINDINGS OF FACT

1. Sadie Ima Sutton, born July 9, 1912, while employed as a packer on April 2, 1948, at Oakland, Cali-

fornia, by Creighton Stationery Company, sustained injury arising out of and occurring in the course of her employment, consisting of injury to her right shoulder and left hip. At said time, said employer's workmen's compensation insurance carrier was Guarantee Insurance Company.

2. Said injury caused certain temporary disability through October 24, 1951, entitling applicant to the sum of $3,333., all of which has been paid.

3. Applicant's injury caused permanent disability of 41½% for the factors of disability set forth in the permanent disability rating served and filed February 4, 1955, entitling her to 166 weeks of disability payments at the rate of $21. a week in the total sum of $3,486., on account of which defendants have paid $3,019. The foregoing weekly benefits are based on earnings of $34. a week.

4. Applicant's injury caused no other or further disability, permanent or temporary, than that herein found.

5. Applicant is not in need of or entitled to further medical treatment to cure or relieve her of the effects of the injury herein.

6. Applicant's attorney, Delger Trowbridge, has rendered further services to applicant of the reasonable value of $300.

AWARD AND ORDER

Award Is Hereby Made in favor of Sadie Ima Sutton against Guarantee Insurance Company of the bal-

ance due for permanent disability indemnity in the sum of $467., less the sum of $300. payable to Delger Trowbridge, as an additional attorney's fee.

It Is Hereby Ordered that applicant take nothing further in these proceedings.

Industrial Accident Commission
of the State of California.
F. A. Lawrence,
John J. Synon,
Commissioners.

Sadie Ima Sutton,

vs.

Creighton Stationery Company, and Guarantee Insurance Company.

S. F., July 22, 1955
Claim No. 117-098
Injury: 4/2/48

REPORT OF PANEL ONE ON APPLICANT'S PETITION FOR RECONSIDERATION

(Due: July 28, 1955)

The employee, a packer, born July 9, 1912, injured her right shoulder and hip on April 2, 1948.

On June 9, 1955, a Decision After Reconsideration was served and filed granting defendants' petition to re-

duce the permanent disability rating for 100%, and it was found therein that the injury caused a permanent partial disability of 41½%. It was further found that the applicant was not in need of further medical treatment.

On June 28, 1955, applicant filed her Petition for Reconsideration, erroneously entitled 'Petition For Rehearing'. Applicant contends that the Commission has no jurisdiction to consider the defendants' petition to reduce the rating because it was filed one day before the five year jurisdictional period expired and that therefore the prior award for 100% permanent disability could not be altered or amended since the order was made subsequent to the expiration of the five year period. In this connection, it is also contended by the applicant that because at the time of the injury the jurisdictional period was 245 weeks that that period of limitation applied and not the five year period that was in effect at the time of the filing of the petition.

Applicant's contentions in both these respects are well answered in defendants' Answer to this Petition for Reconsideration and in defendants' brief attached to their Answer of April 27, 1954 to the applicant's previous Petition for Reconsideration.

The amendment increasing the period of limitation from 245 weeks to five years was enacted in 1949, long before the 245 week period of jurisdiction had expired in this case and, therefore, the statute of limitations being procedural in nature, the five year period would apply. Further, as indicated in the brief, it is the action of the parties by filing a petition that is limited

and not the action of the Commission if the petition is filed within the period specified.

The applicant also contends that the evidence does not justify the reduction of the rating and in this she complains of the fact that only the orthopedic factors of disability were rated in accordance with the report of Dr. Arthur A. Civello and that there is no evidence to justify the inferential finding that there is no neurosis present. However, in this respect, there is very substantial evidence, not only contained in the report and testimony of Dr. Stadtherr, but also it may be noted that the testimony of Dr. Schmidt on behalf of the applicant does not fully sustain the applicant's contention in this respect.

It may be further noted that applicant's attempt to bring into the picture the "odd lot" theory as enunciated in *Meyers v. IAC (Titsworth)* 5 C.C.C. 149, 39 C.A. 2d 665, 103 P. 2d 1025 and mentioned in the case of *California Compensation Insurance Company v. IAC (Moore)* 19 C.C.C. 249 and 287, 128 C.A. 2d 916 276 P. 2d 148 demonstrates a weakness of applicant's position. The "odd lot" theory is applicable only to cases of temporary disability and is not applicable to permanent disability. The very theory of permanent disability under the Compensation Act is that the applicant is entitled to weekly indemnity for such period of time as may be reasonably necessary for his or her rehabilitation in respect to the disability involved.

There are other complaints because of the fact that certain actual findings have not been made. However, findings need only be made in respect to ultimate facts and not as to evidentiary facts.

The applicant's Petition for Reconsideration will be denied.

However, it may well be that the final Order of the Commission that was served and filed on June 9, 1955, although correct in substance, is not correct as to form and details. Therefore, said Decision After Reconsideration that was served and filed on June 9, 1955 will be annulled, vacated and set aside and a new Decision After Reconsideration will be substituted therefor, which will be more correct in respect to form and content and which will include orders annulling the previous Awards of Orders, including the finding of total permanent disability and which Award will also be annulled.

As the record indicates that defendants have paid disability indemnity in the total sum of $6,352. and as the record further indicates that out of this sum $3,333. was for temporary disability indemnity through October 24, 1951, therefore there will be still the sum of $467. due on account of permanent disability indemnity found. The new Order, of course, will contain these detailed findings and a specific award will be made for the balance due, out of which attorney fees will be paid.

Industrial Accident Commission
of the State of California,
F. A. Lawrence,
John J. Synon,
Commissioners.

OCT 8 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 446

CREIGHTON STATIONERY COMPANY and GUARANTEE INSURANCE COMPANY,
Petitioners,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and SADIE IMA SUTTON,
Respondents.

OPPOSING BRIEF OF RESPONDENT SADIE IMA SUTTON TO PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California.

DELGER TROWBRIDGE,
819 A Street, San Rafael, California,
Attorney for Respondent Sadie Ima Sutton.

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In the Supreme Court
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Respondents.

OPPOSING BRIEF OF RESPONDENT SADIE IMA SUTTON TO PETITION FOR A WRIT OF CERTIORARI

to the Supreme Court of the State of California.

Respondent Sutton hereby respectfully submits her brief opposing the petition for a writ of certiorari in the above entitled action.

ANALYSIS OF FACTS.

The facts are correctly albeit incompletely stated in the first two paragraphs of page 5 of the petition.

The facts when analyzed amount to this: Petitioners, an employer and its insurance carrier, filed a petition before the California Industrial Accident Commission entitled "Petition to Reduce Permanent Disability Rating" (see middle of page xx of Appendix D) which could only have been filed under Section 5804 of the California Labor Code. It was filed one day before the five year statute of limitations for reopening awards expired and it was not finally acted on until nearly two years later, although the statute expressly provided it could not be acted on *after* the five year period expired. For reasons hereinafter set forth, this could not be construed as a petition under Section 5410 of the California Labor Code, which petitioners contend is unconstitutional.

Both statutes are quoted together by petitioners (on pages 5-6 of their petition), although they are entirely different statutes dealing with different subjects appearing in different chapters of the California Labor Code, and should therefore not be considered as related or read together.

In effect then we have petitioners proceeding under statute of limitations *A* (Section 5804 California Labor Code) to amend and reduce an award. ***This statute was available to both employers and employees.*** However, the petitioners complain that statute of limitations *B* (Section 5410 California Labor Code) is unconstitutional because it gives employees a slightly longer period of time to get relief for a "new and further disability" than employers have under Statute *A*, to reopen an award (an entirely different matter)

and also because Statute *B* is only available to employees. This is necessarily so because under its wording (see bottom of page 5 of petition for writ) it is *only* available to an injured employee in a case of a "new and further disability" to him. It would of course be ridiculous for an employer to try to get an award because of a "new and further disability" of its own which would be a complete impossibility, or as the Supreme Court put it in this case:

> "In the instant case the proceeding could not have been taken under section 5410 because the employer's carrier filed the application. It was necessarily under sections 5803 and 5804. Section 5410 refers only to a proceeding by the 'injured employee'. By no device may that phrase be held to include an employer or his carrier."

The construction of this statute by the California Supreme Court is of course conclusive on this Court.

To show one of the many *complete dissimilarities* between Statutes *A* and *B* here involved, we point out that under Statute *A* used by petitioners (Section 5804), a petition to rescind, alter or amend can only apply in a case where an award has already been made by the Commission; otherwise, there would of course be nothing to rescind, alter or amend. Under Statute *B* (Section 5410) complained of by petitioners, *but not availed of by them,* an employee can allege a "new and further disability" without any prior award or order ever having been made by the Commission. (See *Pacific Indemnity Co. v. Industrial Accident Commission,* 85 CA 2d 490, and *Hutchinson*

Lumber Co. v. Industrial Accident Commission, 77 CA 141.)

Petitioners have made a completely false statement in their allegation of "The Question Presented" on page 4 of their petition where they state:

> "Has due process of law and the equal protection of the law been denied to the Petitioners by the construction placed upon a statute by a State Court of last resort, which denies to Petitioners a right conferred upon the opposing party in a Workmen's Compensation proceeding before the Industrial Accident Commission of the State of California?"

The facts placed in this question are inaccurate because the statute under which petitioners proceeded before the Industrial Accident Commission of the State of California did not deny to petitioners a right conferred upon the opposing party in a Workmen's Compensation proceeding; that is, petitioners proceeded under Sections 5803 and 5804 of the California Labor Code, which allowed them as well as any employee to file a petition to rescind, alter or amend a previously filed award. The statute which they complain of elsewhere in their petition, namely, Section 5410, was not the one they proceeded under and it was a physical as well as a legal impossibility for them ever to proceed under that statute.

DISCUSSION OF CONSTITUTIONALITY OF STATUTE.

The foregoing analysis shows that petitioners are not and cannot attack the statute they actually proceeded under, as to the other statute; we need go no further than to cite the following decisions which demonstrate that under Workmen's Compensation statutes there are many cases where it is constitutional to treat employees and employers differently in procedural matters because of intrinsic differences between employees and employers.

Mattson v. Department of Labor, 293 U.S. 151, 154 (statute of limitations);

Gange v. Rowley, 326 U.S. 295, 297 (statute of limitations);

Copperweld Steel Co. v. Industrial Commission, 56 N.E. (2d) 154, 156 (certiorari denied by this court, 324 U.S. 780);

Sarja v. Pittsburg Steel Ore Co., (Minn.) 191 N.W. 742;

Marshall v. Foote, 81 Cal. App. 98;

Ahmed's Case, (Mass.) 179 N.E. 684;

Norman's Case, (Mass.) 180 N.E. 238.

PETITIONERS CANNOT ATTACK THE CONSTITUTIONALITY OF SECTIONS 5803-5804 OF THE CALIFORNIA LABOR CODE BECAUSE THEY INVOKED ACTION UNDER THESE SECTIONS.

The rule is stated at 16 C.J.S., page 287 as follows:

"One who has unsuccessfully invoked the aid of a statute in a proceeding cannot later attack its constitutionality in an appeal from the adverse decision."

This rule has been recognized and applied by this Court in the following cases:

United Fuel Gas Co. v. Railroad Commission, 278 U.S. 300, 307;

Hurley v. Commission of Fisheries, 257 U.S. 223;

Callanan Road v. U. S., 345 U.S. 507, 513.

CONCLUSION.

In view of the factual situation analyzed by us above and the authorities cited by us, we respectfully submit that the petition for a writ of certiorari in this case should be denied.

Dated, San Rafael, California,
October 1, 1956.

DELGER TROWBRIDGE,
Attorney for Respondent
Sadie Ima Sutton.